Supreme Court, U.S.
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No. 94-1831

In The Supreme Court of the United States

October Term, 1995

Billie H. Allen, *et al.*,
Petitioners,

v.

PaineWebber, Incorporated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the court of appeals correctly affirm the district court's determination, made on cross motions for summary judgment, that Allen's claim was ineligible for arbitration under § 15 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure ("NASD Code"), where Allen failed to challenge the district court's authority under NASD Code § 15 to make this determination until filing a petition for rehearing with the court of appeals?

PARTIES TO THE PROCEEDING

The petitioner is Billie H. Allen, *et al.*, ("Allen"). The respondent is PaineWebber, Inc. ("PaineWebber").

LISTING OF AFFILIATES PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, Respondent PaineWebber, Incorporated advises that there is no parent or subsidiary company to be listed.

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RESPONDENT'S BRIEF IN OPPOSITION

CODE PROVISION INVOLVED

Section 15 of the NASD Code was the central issue raised in the district court and is the subject now of Allen's Petition. That section contains a specific eligibility provision:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

COUNTERSTATEMENT OF THE CASE

Allen's statement of the case is replete with material misstatements and omissions of the convoluted but important procedural history of this matter. PaineWebber, therefore, believes it is necessary to submit this counterstatement.

On July 17, 1992, twenty-one individuals (collectively, Claimants), commenced an arbitration proceeding before the National Association of Securities Dealers ("NASD"). The Claimants included Billie H. Allen, the name claimant, and E. Jean Metcalf. In their Amended Statement of Claim [1] against PaineWebber, Claimants alleged several theories of recovery, including claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO"). Claimants alleged they had been damaged as a result of purchasing limited partnership interests in PaineWebber Equity Partners I ("EP-I"), a Virginia limited partnership.

Claimants requested that the NASD conduct the arbitration in Richmond, Virginia, since EP-I was a Virginia business entity. The NASD Director of Arbitration granted this request and so notified the Claimants and PaineWebber. Each claimant executed and filed with the NASD a Uniform Submission Agreement expressly requesting that the controversy be submitted to arbitration in accordance with the NASD Code of Arbitration.

All of the claims presented by Claimants arose out of their purchases of EP-I limited partnership interests more than six years prior to the time the arbitration proceeding was filed. NASD Code § 15 provides, however, that claims are "[not] eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to the [claims]."

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[1] There is no record of any Statement of Claim being filed before the Amended Statement of Claim.

On September 10, 1992, PaineWebber commenced a declaratory judgment action in the United States District Court for the Eastern District of Virginia, Richmond Division (the district court). In that action, PaineWebber sought a declaratory judgment enjoining the arbitration on the ground that the claims asserted by the Claimants were ineligible for arbitration. PaineWebber argued that the claims were based on events which occurred more than six years prior to the date on which Claimants initiated the arbitration proceeding before the NASD.

In October of 1992, Claimants filed their first motion to dismiss. Several alternative grounds were asserted, including the assertion that the district court lacked subject matter jurisdiction because "there [was] no written predispute agreement between the parties as required by the Federal Arbitration Act." The district court denied this motion. In December of 1992, Allen filed a Second Motion to Dismiss. This motion asserted that there was no diversity jurisdiction because PaineWebber had failed to join an indispensable party. The district court also denied this motion.

On December 31, 1992, Claimants filed a Second Amended Statement of Claim in the NASD arbitration. The plain purpose and effect of this filing was to substantially expand and embellish the RICO claims.

Thereafter, the parties to the district court proceeding entered into an extensive Stipulation of Fact encompassing some seventy-one paragraphs of text and several hundred pages of exhibits. The parties then filed cross-motions for summary judgment on the issue of whether the claims set forth in the Second Amended Statement of Claim were "eligible" for arbitration in light of the provisions of § 15 of the NASD Code.

In an Order and Memorandum Opinion of April 29, 1993, the district court granted the PaineWebber Motion for Summary Judgment and held that all of the claims presented in the First and Second Amended Statement

of Claims were ineligible for arbitration. Pet. App. 11-26. The district court further held that "NASD Code § 15 is not a statute of limitations which can be tolled by the principles of equitable estoppel." *Id.* All of the defendants except E. Jean Metcalf appealed to the Fourth Circuit.

On appeal, Allen claimed error on three bases: (1) the district court lacked subject matter jurisdiction under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (It was this issue that Allen presented in his first motion to dismiss to the district court); (2) as a matter of substantive law, the six year eligibility provision in § 15 should not preclude arbitration of the RICO claims because the applicable statute of limitations is four years from the date that the defendants discovered their injury. (This issue was presented to the district court in the parties' cross motions for summary judgment); and (3) the district court erred in declining to dismiss PaineWebber's complaint because PaineWebber had failed to join a necessary party in order to create diversity jurisdiction. (It was this issue that Allen presented in his second motion to dismiss to the district court).

On January 10, 1995, the Fourth Circuit summarily rejected all of Allen's arguments in an unpublished *per curiam* opinion. The Court concluded that the district court had correctly held "that it had diversity jurisdiction and did not hold that the Federal Arbitration Act confers jurisdiction." Pet. App. 10.

On January 23, 1995, Allen filed a petition for rehearing to the Court of Appeals suggesting for the first time that the district court not only had decided the eligibility issue incorrectly, but also had erred in reaching the issue under NASD Code § 15. Allen argued for the first time to the Fourth Circuit that "the majority of circuits . . . [had held] that the eligibility question of § 15 . . . was a question for the arbitrators." Petition for Rehearing at 3. The Fourth Circuit denied the Petition for Rehearing

without explanation on February 6, 1995. On February 13, 1995, the court issued a mandate to effect its judgment.

After the April 29, 1993, decision by the district court, and prior to any resolution in the Fourth Circuit, E. Jean Metcalf, the arbitration claimant who had withdrawn from the appeal to the Fourth Circuit, filed a putative class action proceeding in the United States District Court for the Western District of Pennsylvania, Erie Division. The same counsel who represented Metcalf in the NASD arbitration and in the district court action in Virginia, also represented her in the Pennsylvania action. Metcalf filed the Pennsylvania action on May 17, 1993, on behalf of herself and all others who had purchased EP-I. The *Metcalf* class action asserted only RICO claims, the same claims that had been asserted in the arbitration action before the NASD.

PaineWebber moved to dismiss the Pennsylvania action for failure to allege any facts from which a court or jury could find that PaineWebber violated RICO. Plaintiff requested and took limited discovery in order to respond to the Motion to Dismiss. Plaintiff then filed briefs in opposition to PaineWebber's Motion as well as a request for leave to file an Amended Complaint. In an Order and twenty-eight page Memorandum Opinion of May 11, 1995, the Pennsylvania district court granted the Motion to Dismiss. It further denied leave to amend on the ground that Metcalf's proposed amendment would not cure her Complaint's fatal defects. Metcalf filed a motion to alter or amend the judgment; this motion was denied by order dated May 23, 1995. Metcalf has filed a notice of appeal to the Third Circuit.

Accordingly, the claims presented in the underlying action have been presented, or are currently being pursued, before the NASD, United States District Court for the Eastern District of Virginia, the Fourth Circuit Court of Appeals, United States District Court for the Western District of Pennsylvania, the Third Circuit Court of Appeals and the United States Supreme Court.

REASONS FOR DENYING THE WRIT

The Court should deny the petition for certiorari for two reasons. First, Allen did not raise the arbitrability issue presented by this petition in his appeal to the Fourth Circuit, and thus the circuit court did not address the issue. Second, an unpublished *per curiam* opinion from the Fourth Circuit, affirming a district court decision on cross-motions for summary judgment, is not an appropriate vehicle for addresing the constellation of issues surrounding the question presented for review. While the authorities cited by Allen do not support his contention that there is a conflict between the circuits, the Fifth Circuit has recently issued an opinion that could be construed as contrary in some respects to the holdings of the Third, Sixth and Seventh Circuits. These holdings were expressly relied on by the district court for the proposition that the issue of arbitrability is reserved to the courts under NASD Code § 15. Because the Fourth Circuit did not address this issue, the Fifth Circuit decision does not contradict the Fourth Circuit's holding. Moreover, a careful review of the Fifth Circuit decision suggests that Allen's claims could have been held barred even if litigated in the Fifth Circuit.

I. ALLEN HAS NOT PROPERLY PRESERVED THE ISSUE BELOW THAT HE NOW RAISES IN THE PETITION FOR CERTIORARI

In his appeal to the Fourth Circuit, Allen did not dispute the district court's authority to determine arbitrability under NASD Code § 15. By failing to contest the district court's resolution of this matter, Allen waived the issue on appeal. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia.*, 18 F.3d 269, 276 (4th Cir.), *cert. granted*, 115 S. Ct. 417 (1994) (Because the plaintiff did not argue the point on appeal, "we are therefore compelled to conclude that the parties have failed to appeal [the issue]. Failure of this nature constitutes aban-

donment of the claims and precludes us from considering them further herein.").

After the Fourth Circuit issued its *per curiam* opinion rejecting Allen's assignments of error, Allen filed a petition for rehearing to the Fourth Circuit. As detailed above, it was in this petition that he first raised the issue of whether the district court or the arbitrator determines arbitrability under NASD Code § 15. Although the court denied the petition for rehearing without explanation, it is well-established that a rehearing will not be granted on an issue first raised in the petition for rehearing. *See Joseph v. Blair*, 488 F.2d 403, 404 (4th Cir. 1973) ("The suggestion [of an alternative basis for application of *Younger*] is made first in the petition for rehearing, and we think it comes too late."); *see also Costo v. United States*, 922 F.2d 302, 302-03 (6th Cir. 1990) ("Generally, an argument not raised in an appellate brief or at oral argument may not be raised for the first time in a petition for rehearing.")

Because Allen did not challenge the district court's authority under NASD Code § 15 to determine eligibility of the dispute for arbitration in his appeal, the parties did not brief the issue and the Fourth Circuit did not address it. Absent exceptional circumstances not present in this case, this Court does not and should not decide the merits of an issue not considered below. *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (per curiam) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals.").

II. THE ISSUE PRESENTED DOES NOT MERIT SUPREME COURT REVIEW AND IN ALL EVENTS THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR DECIDING THE ISSUE

The cases cited by Allen do not establish a split between the circuit courts on the question whether a court or an arbitrator determines the eligibility of a dispute for

arbitration under NASD Code § 15. Allen cites only three circuit court cases construing the eligibility provision of NASD Code § 15. All three held that the plain language of § 15 requires that courts, not arbitrators, determine the eligibility of a dispute for arbitration. *Roney & Co. v. Kassab*, 981 F.2d 894, 898-99 (6th Cir. 1992) (adopting the reasoning of the Seventh Circuit "that the word 'eligible' must be given its plain and literal meaning"); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 513 (7th Cir. 1992) (declining to reconsider its earlier holdings "that NASD Section 15 operates as an eligibility requirement which bars from arbitration claims submitted more than six years after the event which gave rise to them."); *PaineWebber, Inc. v. Hartmann*, 921 F.2d 507, 513-14 (3rd Cir. 1990) (the "plain language" of six year eligibility provision "unambiguously supports . . . the district court's conclusion that the parties intended to bar from arbitration disputes raised more than six years after the events giving rise to the harm").

Allen's citation to other cases is irrelevant to the issue before this Court for the simple reason that none of these cases construe the eligibility provision of NASD Code § 15.[2] These cases merely affirm the unexceptional principle that arbitrators resolve procedural disputes in matters properly before the arbitrators.

Forty-five days before Allen filed his petition for certiorari, however, the Fifth Circuit issued an opinion, not cited by Allen, that cannot be harmonized completely with the circuit court opinions relied on by the district court. *See Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 754 (5th Cir. 1995). In that opinion the

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[2] *See Automotive, Petroleum & Allied Indus. Employees Union, Local No. 618 v. Town & Country Ford, Inc.*, 709 F.2d 509 (8th Cir. 1983); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023 (11th Cir. 1982); *O'Neel v. National Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804 (9th Cir. 1982); *Conticommodity Serv., Inc. v. Phillipp & Lion*, 613 F.2d 1222 (2nd Cir. 1982); *Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976).

Court held that "the timeliness issues raised in this case" are ones that "must be decided by the arbitrator." *Id.* Yet the Fifth Circuit opinion is not consistent with the argument advanced by petitioners because the Fifth Circuit recognized that in certain circumstances courts do have authority under NASD Code § 15 to enjoin arbitration. In his petition to this Court, Allen contends that the courts have no role in making the threshold decision as to arbitrability.

The *Boone* court also went to considerable length to narrow the breadth of its holding. First, the Court noted that the proposition that eligibility provisions are prerequisites to an arbitrator's jurisdiction was one that enjoyed "some support." *Id.* at 754. Next, the Court declared repeatedly that it was unclear to the Court whether the plaintiff's claims had in fact been brought within six years of the event giving rise to the claims because there was "some controversy as to when the last act or occurrence giving rise to the claims . . . took place." *Id.* "There is some dispute as to the effect of the time bars." *Id.* The Court concluded, "[t]hus, there is substantial controversy over whether the time bars will act to bar the causes of actions asserted. . . ." Again, the Court reiterated the significance of the muddled state of the factual record when the court affirmed that it would enjoin arbitration if "the time bars cited by [defendants] will absolutely bar arbitration. . . ." *Id.*

In the case now before this Court, the district court and the Fourth Circuit determined that Allen's claims are barred by the six year eligibility provision. The district court found that all of Allen's claims "were submitted more than six years subsequent to the dates their respective interests in EP-I were purchased." Pet. App. 22. On appeal, the Fourth Circuit affirmed this finding. Pet. App. 10. Allen has not challenged this finding in his petition to this Court.

Given the determination of the district court in this case that more than six years had elapsed since the occurrence giving rise to the claims stated, it is likely that, if the Fifth Circuit had been asked to review the decision of the Virginia district court, it would have affirmed the decision of the district court enjoining arbitration.

In contrast to the equivocal holding of the Fifth Circuit, the Supreme Court has held that, "the question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 647 (1986).

Similarly, other circuit courts have announced emphatically that the "eligibility for submission" language found in NASD Code § 15 and NYSE Rule 603 reserves the question of arbitrability to the courts. *See, e.g., Paine Webber, Inc. v. Hartmann,* 921 F.2d 507 (3rd Cir. 1990). There, the *Hartmann* Court observed first that interpretations of such Code provisions requires the "interpretation of contractual language to discern contractual intent." *Id.* at 510. As such, it "is a question of fact" in which appellate "review is limited to a determination whether the district court's findings are clearly erroneous." *Id.*

The Court proceeded to detail the reasons it concurred in the judgment that arbitrability decisions are reserved to the courts:

> First, the plain language of Rule 603 states that after six years from the event giving rise to a dispute have elapsed, the dispute shall [not] be *eligible* for *submission* to arbitration. 'Eligible' is defined as 'fitted or qualified to be chosen or used' or 'worthy to be chosen or selected.' *Webster's Third New International Dictionary* 736 (1966). 'Submission' is

> defined as the act of 'commit[ting something] for consideration, study, or decision.' *Id.* at 2277. Interpolating these definitions into the text of Rule 603, the relevant portion of the rule would state that, after six years, a dispute 'shall [not] be worthy to be chosen or selected for [the] consideration, study, or decision [of arbitration].' We think this expanded reading of Rule 603 unambiguously supports PaineWebber's argument and the district court's conclusion that the parties intended to bar from arbitration disputes raised more than six years after the events giving rise to them.
>
> Second, the only other appellate court to interpret, in a similar context, language identical to Rule 603—namely that found in Sect. 15 of the [NASD Code]—reached the same conclusion as we. In *PaineWebber, Inc. v. Farnam,* 870 F.2d 1286, 1292 (7th Cir. 1989), the Seventh Circuit also reasoned that the word 'eligible' must be given its plain and literal meaning and interpreted as absolutely barring stale disputes from reaching arbitration. It is interesting to note, additionally, that the *Farnam* court based its decision, in part, on a letter, written in 1988, in which an NASD staff attorney stated that the organization intended Sect. 15 to function as "an eligibility requirement rather than a statute of limitations" . . . .
>
> Third, the language of Rule 603 stands in stark contrast to that found in the [statute of limitations] cases cited by [appellant].

Id. at 513. These statute of limitations cases that the *Hartmann* court expressly distinguished and found inapplicable are the same cases that Allen now relies on in his petition to this Court.

In sum, the reasoning of the district court in this case, which was not challenged in the Fourth Circuit, is amply and persuasively supported by virtually every other court that has considered the issue of arbitrability. This Court therefore should deny Allen's petition, particularly where

this Court does not have the benefit of the Fourth Circuit's analysis of the issue. An unpublished *per curiam* opinion is not an appropriate vehicle for review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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